No. 06-1346

In the Supreme Court of the United States

AHMED ALI, PETITIONER

v.

DEBORAH ACHIM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that an offense need not be an aggravated felony to be classified as a "particularly serious crime" that bars eligibility for withholding of removal.

2. Whether the court of appeals correctly found that it lacked jurisdiction to consider petitioner's argument that the Board of Immigration Appeals misapplied its precedent to the specific facts of his case in concluding that his offense constituted a "particularly serious crime" barring him from eligibility for withholding of removal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 468 F.3d 462. The final order of removal of the Board of Immigration Appeals (BIA) (Pet. App. 36a-42a) and the decision of the immigration judge (IJ) giving rise to the final order of removal (Pet. App. 43a-53a) are unreported. Prior relevant orders of the BIA (Pet. App. 54a-59a) and the IJ (Pet. App. 60a-69a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 2006. A petition for rehearing was denied on January 5, 2007. Pet. App. 70a-71a. The petition for a writ of certiorari was filed on April 5, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, defines a "refugee" as an alien who is unwilling or unable to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). The Attorney General is vested with discretion whether to grant asylum to an alien who satisfies the statutory definition of a refugee. 8 U.S.C. 1158(b)(1) and (2), 1252(a)(4)(D). An alien is disqualified from consideration for asylum, however, "if the Attorney General determines" that "the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." 8 U.S.C. 1158(b)(2)(A)(ii). For asylum purposes, "an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime." 8 U.S.C. 1158(b)(2)(B)(i). The INA also authorizes the Attorney General to designate by regulation offenses that will necessarily be considered particularly serious crimes. 8 U.S.C. 1158(b)(2)(B)(ii).

The INA authorizes another form of relief, withholding of removal, if the Attorney General determines that an "alien's life or freedom would be threatened" in the country to which the alien would be removed "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). As with asylum, withholding of removal is not available "if the Attorney General decides" that "the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States." 8 U.S.C. 1231(b)(3)(B)(ii).

For purposes of withholding of removal, the INA further provides:

> [A]n alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.

8 U.S.C. 1231(b)(3)(B).

Since 1996, the INA has barred federal-court review of certain decisions made by the Attorney General in immigration cases. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 306, 110 Stat. 3009-607. As pertinent here, the INA provides:

> [N]o court shall have jurisdiction to review * * * any * * * decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. 1252(a)(2)(B)(ii). The phrase "this subchapter" refers to Title 8 of the United States Code, Chapter 12, subchapter II, which is codified at 8 U.S.C. 1151 through 1378. See *Van Dinh* v. *Reno*, 197 F.3d 427, 433 (10th Cir. 1999).

In 2005, Congress qualified that jurisdictional bar by providing:

> Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310 (to be codified at 8 U.S.C. 1252(a)(2)(D) (Supp. V 2005)).

2. Petitioner is a native and citizen of Somalia. Pet. App. 2a, 61a. He was admitted to the United States at New York City in 1999 as a refugee and settled in Madison, Wisconsin. *Id.* at 4a.

In June 2000, petitioner attacked a man in downtown Madison. Pet. App. 4a. Petitioner had previously been involved in "a string of altercations" with the man, in which the man and his friends had beaten up petitioner. *Ibid.* Petitioner "went after" the man and "punched him first," *ibid.* (quoting petitioner's statement), and then "produced a box-cutting instrument and cut the other man about the face, chest, hand, shoulder, and back, saying, 'I'm gonna kill you all,' " *ibid.* Petitioner's victim required 32 stitches. *Id.* at 58a.

Petitioner was convicted of substantial battery—intending substantial harm, in violation of Wis. Stat. § 940.19(3) (2001), and use of a dangerous weapon, in violation of Wis. Stat. § 939.63(1)(a)(2) (2001). Pet. App. 4a, 55a. He was sentenced to eleven months of incarceration and seven years of probation. *Id.* at 5a.

3. The Department of Homeland Security initiated removal proceedings by issuing petitioner a Notice to Appear, which charged him with being removable under

8 U.S.C. 1227(a)(2)(A)(i) as an alien convicted of a crime involving moral turpitude committed within five years of admission. Pet. App. 55a.

a. Petitioner conceded removability on account of his conviction but sought relief from removal in the form of a waiver of inadmissibility, asylum, withholding of removal, and protection under the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), Dec. 10, 1984, 1465 U.N.T.S. 85. Pet. App. 5a, 61a. The IJ denied petitioner's request for a waiver of inadmissibility and asylum, granted him withholding of removal, and did not consider the CAT claim. *Id.* at 60a-68a.

Petitioner appealed the IJ's denial of asylum and a waiver of inadmissibility to the BIA, and the government cross-appealed. Pet. App. 54a. On the government's cross-appeal, the BIA reversed, concluding that petitioner could not obtain withholding of removal because he had been convicted of a "particularly serious crime." *Id.* at 57a-58a. The BIA explained that "the very definition of [petitioner's] conviction involves the intentional infliction of bodily harm on another with a dangerous weapon"; the nature and circumstances of petitioner's crime ("inflict[ion] [of] multiple wounds" with a box cutter) demonstrate a danger to the community; and the offense's potential sentence of nine years of incarceration "indicates the seriousness by which the community regards such offenses." *Id.* at 58a. The BIA then found that petitioner's conviction of a "particularly serious crime" also barred him from eligibility for asylum. *Id*. at 56a. Finally, the BIA affirmed the denial of petitioner's request for a waiver of inadmissibility, *id.* at 55a-56a, and remanded the case for consideration of petitioner's CAT claim, *id.* at 59a.

b. On remand, the IJ granted petitioner protection under the CAT. Pet. App. 43a-52a. The government appealed that ruling, and petitioner cross-appealed, requesting that the BIA reconsider its denial of withholding of removal.

The BIA reversed the IJ's grant of CAT protection. Pet. App. 39a-42a. It also denied petitioner's request for reconsideration, reaffirming that petitioner's offense constitutes a "particularly serious crime" barring him from receiving asylum and withholding of removal. *Id.* at 38a-39a. The BIA rejected petitioner's claim that it had failed to consider potentially mitigating factors, including that petitioner suffers from post-traumatic stress disorder, because "[t]he fact that there may have been circumstances which caused [petitioner] to act in such a way does not alter the fact that [he] has shown a propensity for violent behavior and a disregard for the risk of physical harm to others." *Id.* at 39a.

c. The court of appeals denied petitioner's petition for review on his waiver of inadmissibility, asylum, and withholding claims, but granted the petition for review with respect to his CAT claim. Pet. App. 1a-20a.

The court of appeals first considered its jurisdiction to review the BIA's discretionary determinations regarding a waiver of inadmissibility, asylum, and withholding of removal. Pet. App. 5a-6a. The court noted that 8 U.S.C. 1252(a)(2)(B) generally deprives courts of jurisdiction to review discretionary denials of immigration relief, but also noted that the statute contains an exception for "constitutional claims or questions of law" raised before the court of appeals, 8 U.S.C. 1252(a)(2)(D). Pet. App. 6a. Based on the statutory exception, the court concluded that it "retain[ed] jurisdiction to examine whether the correct legal standard was

applied to [petitioner's] claim for relief." *Id.* at 6a. The court of appeals then rejected petitioner's claim that the BIA applied an incorrect standard in assessing his request for a waiver of inadmissibility. *Id.* at 6a-10a.[1]

The court of appeals turned to the BIA's determination that petitioner had committed a "particularly serious crime." Pet. App. 10a-15a. Petitioner had argued that only aggravated felonies may qualify as "particularly serious crimes" under the asylum and withholding of removal statutes. *Id.* at 10a.[2] The court of appeals determined that it had jurisdiction to review that argument because it "present[ed] questions of law." *Ibid.* It then evaluated the BIA's conclusion that non-aggravated felonies could be particularly serious crimes under the framework set forth in *Chevron U.S.A., Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842 (1984), Pet. App. 10a, remarking that deference is "especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations," *id.* at 11a (quoting *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (internal quotation marks omitted)).

In the asylum context, the court of appeals noted that Section 1158(b)(2) provides "two categories of per se 'particularly serious' crimes"—aggravated felonies and crimes that the Attorney General designates by regulation—but "d[oes] not say that these [a]re the only

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[1] Petitioner does not raise any issue in this Court regarding the denial of his request for a waiver of inadmissibility.

[2] The parties agreed that petitioner's crime of conviction was neither an aggravated felony (as that term is defined for immigration purposes) nor a crime the Attorney General has by regulation designated as "particularly serious" for purposes of asylum. Pet. App. 12a n.3; see 8 U.S.C. 1158(b)(2)(B)(ii); p. 2, *supra*.

categories of crimes that would bring an alien's case within the statutory bar." Pet. App. 12a. Thus, the court concluded, "to the extent there is any ambiguity" in the definition of "particularly serious crime," the BIA's interpretation was "entirely permissible, particularly considering the vast array of crimes defined by each of the fifty states' criminal codes." *Ibid.*

The court "reach[ed] the same conclusion with respect to the withholding of removal statute, 8 U.S.C. § 1231(b)(3)(B)." Pet. App. 13a. It rejected petitioner's argument that the statutory language unambiguously signifies "that only aggravated felonies count as particularly serious crimes for purposes of withholding of removal ineligibility." *Ibid.* The court explained that Section 1231(b)(3)(B) "does not state a general rule that only aggravated felonies can be considered 'particularly serious' crimes"; its "designation of aggravated felonies producing sentences of at least five years' imprisonment as per se 'particularly serious' creates no presumption that the Attorney General may not exercise discretion on a case-by-case basis to decide that other non-aggravated-felony crimes are also 'particularly serious'"; and, although "Congress specified that the Attorney General may extend the 'particularly serious' designation to aggravated felonies producing prison terms of less than five years," "the absence of a similar provision for non-aggravated-felony crimes does not imply that only aggravated felonies can qualify as 'particularly serious' crimes." *Id.* at 14a. "[T]o the extent that § 1231(b)(3)(B) is ambiguous on this point," the court concluded, "the BIA's reasonable interpretation is entitled to deference." *Ibid.*

Having found that the BIA "did not apply an incorrect legal standard when it determined that [petitioner]

committed a 'particularly serious' crime," the court of appeals then determined that it lacked jurisdiction to consider petitioner's other argument—that the "BIA misapplied its own precedent" to the facts of his case—because that determination was an "exercise of [the BIA's] statutorily conferred discretion." Pet. App. 15a.

Finally, the court granted the petition with respect to petitioner's CAT claim and remanded that claim for further proceedings. Pet. App. 15a-19a.

ARGUMENT

The decision below is correct, and no further review of the case is warranted. Petitioner contends (Pet. 6-10) that the decision below creates a conflict on the question whether an offense must be an aggravated felony to be classified as a "particularly serious crime" barring eligibility for withholding of removal.[3] He also contends (Pet. 10-19) that the courts of appeals are divided regarding the scope of their jurisdiction to review "particularly serious crime" determinations. On the first question presented, the decision below is in tension with a recent decision of the Third Circuit, but review is not warranted at this time because any conflict has not fully developed and may be resolved without this Court's intervention. On the second question presented, there is no square conflict in approach implicated by this case.

1. The court of appeals correctly upheld the BIA's determination that an offense need not be an aggravated felony to be classified as a "particularly serious crime"

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[3] Petitioner does not seek review of the court of appeals' holding that an offense need not be an aggravated felony to be classified as a "particularly serious crime" that bars eligibility for *asylum* under 8 U.S.C. 1158(b)(2).

that bars eligibility for withholding of removal, and that determination does not warrant this Court's review.

a. The INA declares an alien ineligible for withholding of removal "if the Attorney General decides that" the alien "is a danger to the community of the United States" because he has "been convicted by a final judgment of a particularly serious crime." 8 U.S.C. 1231(b)(3)(B)(ii). An "aggravated felony * * * for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years" is necessarily a particularly serious crime, but that per se rule does not "preclude the Attorney General from determining that, notwithstanding the length of the sentence imposed, an alien has been convicted of a particularly serious crime." 8 U.S.C. 1231(b)(3)(B).

As the court of appeals properly noted, Section 1231(b)(3)(B) does not set forth a broad rule that only aggravated felonies may qualify as particularly serious crimes. Instead, it grants the Attorney General the authority to decide if a crime is particularly serious, with the only limitation being that some aggravated felonies *are* per se "particularly serious." Pet. App. 13a-14a. Nothing in Section 1231(b)(3)(B) specifies that certain crimes are per se *not* "particularly serious." And, as relevant here, nothing in the statutory text "precludes the Attorney General from finding" that a non-aggravated felony is a "particularly serious crime." *Id.* at 14a. Indeed, if Congress had wished to limit particularly serious crimes to aggravated felonies, it easily could have done so.[4] Congress, however, imposed no such rigid lim-

[4] Congress has defined eligibility for certain types of relief based on whether an alien has been convicted of an aggravated felony (as opposed to a particularly serious crime). See, *e.g.*, 8 U.S.C. 1229b(a)(3) (cancellation of removal); 8 U.S.C. 1229c(a)(1) (voluntary departure).

itation. Instead, the statute provides the Attorney General the authority to deem "particularly serious" a crime for which an alien has been "convicted," without the sort of categorical exclusion of non-aggravated felonies that petitioner advocates. 8 U.S.C. 1231(b)(3)(B).

Because the statutory text does not prohibit the Attorney General from determining that a non-aggravated felony is a "particularly serious crime," the BIA's interpretation of the statute is entitled to deference. This Court has recognized that the BIA "should be accorded *Chevron* deference as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication." *Aguirre-Aguirre*, 526 U.S. at 425 (quoting *INS* v. *Cardoza-Fonesca*, 480 U.S. 421, 448-449 (1987)); see 8 C.F.R. 1003.1(d)(1). As relevant here, the BIA has interpreted the term "particularly serious crime" as not limited to aggravated felonies, instead taking the position that whether a crime is "particularly serious" depends upon "consideration of the individual facts and circumstances" of each case. *In re L-S-*, 22 I. & N. Dec. 645, 651 (1999). Those facts and circumstances include "the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community." *In re Frentescu*, 18 I. & N. Dec. 244, 247 (1982).

The BIA's interpretation of Section 1231(b)(3)(B) is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Nothing in the statute precludes the BIA's interpretation, and it is supported by the broad discretion afforded the Attorney General to "decide that" an alien has been convicted of a particularly serious crime. 8 U.S.C. 1231(b)(3)(B). Moreover,

the statute's legislative history confirms that, beyond the per se rule for aggravated felonies for which an alien received at least a five-year sentence, Congress intended that the "Attorney General retain[] the authority to determine other circumstances in which an alien has been convicted of a particularly serious crime, regardless of the length of sentence." H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 216 (1996). There is no suggestion in the Conference Report that those "other circumstances" are limited to aggravated felonies. The BIA's interpretation was thus a "fair and permissible reading of the statute," *Aguirre-Aguirre*, 526 U.S. at 428, and was properly upheld by the court of appeals.

Petitioner suggests that Section 1231(b)(3)(B)'s provision—in the sentence following the command that an aggravated felony for which an alien received at least a five-year sentence is per se a particularly serious crime—that the Attorney General may decide that crimes are particularly serious "notwithstanding the length of the sentence imposed" implies that only aggravated felonies may qualify as particularly serious crimes, invoking the canon *expressio unius est exclusio alterius*. Pet. 8. The *expressio unius* canon has no application here because the canon does not apply when "statutory language suggesting exclusiveness is missing," *Chevron U.S.A., Inc.* v. *Echazabal*, 536 U.S. 73, 80-81 (2002), such as when the statute "give[s] an agency * * * a good deal of discretion" in making a determination, *id.* at 80. Nothing in Section 1231 suggests that Congress intended to limit the Attorney General's authority to make *case-by-case* determinations of what constitutes "particularly serious crimes" to aggravated felonies simply because certain such felonies are *categorically* included. To the contrary, Section 1231 grants

the Attorney General broad discretion to "decide[]" that a crime is particularly serious, and reinforces that discretion by stressing that nothing in the sentence referring to five-year sentences "preclude[s] the Attorney General from determining that" a crime is particularly serious regardless of the sentence imposed. 8 U.S.C. 1231(b)(3)(B). It thus would be unreasonable to "suppose that Congress considered the unnamed possibility [of a non-aggravated felony being deemed a particularly serious crime] and meant to say no to it." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003); see Pet. App. 14a. In any event, the *expressio unius* canon, which rests on a negative inference from what the statute does *not* say, does not render the statute textually unambiguous such that it precludes deference to the BIA's reasonable interpretation of the statute.

Petitioner does not contest the court of appeals' decision insofar as it sustained the BIA's conclusion that a "particularly serious crime" for purposes of the bar to *asylum* can include non-aggravated felonies. See pp. 7, 9 n.3, *supra*. That interpretation of the asylum bar supports a parallel interpretation of the withholding bar. Petitioner, however, contends that the asylum provision actually suggests the contrary—that non-aggravated felonies *cannot* be "particularly serious crimes," because "eligibility for withholding [should] be significantly broader than for asylum." Pet. 9. But it is too simplistic to categorize asylum relief as necessarily "narrower" than withholding of removal, particularly in light of the fact that there are several ways in which it is "broader." For example, an alien must prove a "clear probability of persecution upon deportation" to satisfy the withholding standard, a higher standard than that required under the asylum statute. *Cardoza-Fonesca*, 480 U.S. at 430

(internal quotation marks omitted). In any event, petitioner's argument based on the supposed "structure" of the INA in this respect does not render Section 1231(b)(3)(B) unambiguous and preclude deference to the BIA's reasonable interpretation of that provision.

b. The court of appeals' holding that an offense need not be an aggravated felony to be classified as a particularly serious crime is inconsistent with the result reached by the Third Circuit in *Alaka* v. *Attorney General*, 456 F.3d 88 (3d Cir. 2006). The *Alaka* court held that an offense must be an aggravated felony to qualify as a "particularly serious crime" under Section 1231(b) because, it believed, the text and structure of the statute "suggest" as much. *Id.* at 104. Without *any* mention of the Attorney General's broad discretion to "decide[]" that a crime is particularly serious, or *any* mention of deference under *Chevron* and *Aguirre-Aguirre*, the Third Circuit determined that an "impli[cation]" in the statute resolved the matter: "The second sentence, authorizing the Attorney General to determine when a conviction is 'particularly serious,' is clearly tied to the first; it explicitly refers back to the 'previous sentence,' and accordingly *implies* that it is limited to aggravated felonies." *Id.* at 104-105 (emphasis added). That brief explanation concluded the Third Circuit's legal analysis.

The Third Circuit's rationale is seriously flawed even on its own terms. To the extent that the second sentence refers back to the previous sentence, it simply dispels any negative inference from the categorical rule of inclusion of certain aggravated felonies in the previous sentence that other aggravated felonies for which the alien received a sentence of less than five years cannot be determined to be particularly serious crimes on a case-by-case basis. On the Third Circuit's hypothesis,

then, the second sentence, like the first, simply does not speak to the question of the Attorney General's authority to determine that a *non*-aggravated felony is a "particularly serious crime." In any event, the Third Circuit's view of what the structure of Section 1231(b)(3)(B) "suggests" or "implies" does not render the statute textually unambiguous.

Despite the contrary results reached in *Alaka* and the decision below, certiorari is not warranted at this time. First, the courts did not address—and reach differing conclusions on—the same issue. The Seventh Circuit held that deference is due the BIA's reasonable interpretation of Section 1231(b)(3)(B), while the Third Circuit overlooked the question of agency deference entirely. Compare Pet. App. 10a-14a, with *Alaka*, 456 F.3d 104-105. The two circuits' approaches thus are not in square conflict.

Second, the two courts decided the issue without either addressing the other's opinion. The Third Circuit's opinion in *Alaka* came before the panel opinion in this case, giving the Third Circuit no opportunity to consider the Seventh Circuit's contrary conclusion (and its detailed explanation of why deference to the BIA is appropriate). Although the Third Circuit issued its decision in *Alaka* before the Seventh Circuit's decision, the Seventh Circuit's decision made no mention of *Alaka*. Under such circumstances, it would be prudent to delay review of the question presented until the circuits have the benefit of considering each other's reasoning.

Third, only two circuits have weighed in on the legal question presented here. This Court should decline review until other circuits have had an opportunity to consider the reasoning of the Third and Seventh Circuits and come to their own conclusions. Indeed, this issue is

currently pending in the Ninth Circuit in *Desire* v. *Gonzales*, No. 03-16178. This Court's resolution of the issue would benefit from additional percolation in the courts of appeals, especially in those circuits with a more substantial portion of the federal courts' immigration cases.

Finally, there is a significant possibility that any conflict will be eliminated without this Court's intervention. The fact that the Third Circuit did not even consider affording deference to the BIA renders its legal conclusion plainly suspect. See *Aguirre-Aguirre*, 526 U.S. at 425 (finding that court of appeals erred "by failing to follow *Chevron* principles in its review of the BIA").[5] The disagreement thus may well disappear when the Third Circuit considers the legal question through the framework of agency deference. See *National Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-983 (2005) (agency is entitled to deference even where court of appeals has previously construed statute de novo, unless "the prior court decision h[eld] that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion").

2. Petitioner also contends that, in holding that it lacked jurisdiction to review the BIA's determination that petitioner's crime was "particularly serious" based on the facts of this case, the Seventh Circuit created conflicts with the Third, Ninth, and Tenth Circuits as to the scope of review of particularly serious crime deter-

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[5] Oddly enough, even the *Alaka* court recognized this principle in another portion of its opinion. See 456 F.3d at 95 n.11 (noting that "[e]very Circuit Court that has considered the question has deferred to the BIA's interpretation" of the question whether a "particularly serious crime" "necessarily constitutes a danger to the community" under 8 U.S.C. 1231(b)(3)(B)(ii)).

minations under 8 U.S.C. 1252. Pet. 11. No square conflicts are presented, and the decision below is correct.

a. Petitioner argued below that the BIA misapplied its precedent for determining what constitutes a "particularly serious crime" to the facts of his case. He asserted that the BIA "failed to balance various elements" in determining whether a crime is "particularly serious" under *In re Frentescu*, 18 I. & N. Dec. 244 (1982). See Pet. C.A. Br. 19; see also Pet. App. 14a. In particular, petitioner argued that the BIA placed too much weight on the "general elements of the Wisconsin statute" and not enough weight on "the lenient actual sentence imposed by the Wisconsin trial court," and that it erred in its overall conclusion that petitioner's crime was very serious under the "totality of the circumstances." Pet. C.A. Br. 19.[6]

The court of appeals correctly held that it lacked jurisdiction over that claim, which is nothing more than a challenge to the BIA's exercise of its discretionary authority to determine whether, applying the correct legal standard, the circumstances of the crime at issue in the individual alien's case render it "particularly seri-

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[6] Petitioner now claims that he presented a purely legal claim to the court of appeals in arguing that "the Board erred in applying its holding in *In re Garcia-Garrocho*, 19 I. & N. Dec. 423 (BIA 1986)," to find that his offense is "per se" "particularly serious." Pet. 16-17. In context, it is clear that petitioner's challenge concerned the BIA's application of its precedent in *In re Frentescu* (and, to a lesser extent, *In re Garcia-Garrocho*) to the particular facts of his case, and not a purely legal claim about the continuing vitality of the legal standard in *In re Garcia-Garrocho*. See Pet. C.A. Br. 19-23 (arguing that the BIA failed to "giv[e] adequate weight" to certain factors, such as the length of his sentence). Moreover, the BIA's analysis makes clear that it did not simply apply a "per se" rule based solely on the statutory definition of petitioner's offense. See Pet. App. 38a-39a, 56a-58a.

ous." Section 1231(b) commits to the Attorney General the discretion to "decide[]" that an alien's offense is a "particularly serious crime," and the only qualification is Congress's determination that some crimes are per se particularly serious. 8 U.S.C. 1231(b)(3)(B). No statute or regulatory provision further defines the term "particularly serious crime" or sets out any method by which the agency should determine whether a crime is "particularly serious." Pet. App. 13a-15a. The determination is thus a "decision or action * * * the authority for which is * * * in the discretion of the Attorney General," over which judicial review is precluded by 8 U.S.C. 1252(a)(2)(B). Further, petitioner's argument about the application of the BIA's legal test to the facts of his case raises no "constitutional claim[]" or "question[] of law," 8 U.S.C. 1252(a)(2)(D), implicating the statutory exception. The Seventh Circuit thus correctly concluded that review of petitioner's fact-bound and case-bound challenge "would require an improper assertion of jurisdiction over the BIA's exercise of its statutorily conferred discretion." Pet. App. 15a.

b. Petitioner alleges disagreement between the Seventh and Ninth Circuits and the Third Circuit on whether the BIA's conclusion that a given crime is "particularly serious" under Section 1231(b)(3)(B) is unreviewable under Section 1252(a)(2)(B). He also claims that, in those circuits that deem the "particularly serious crime" determination discretionary, there is disagreement regarding the circumstances under which the exception in Section 1252(a)(2)(D) for "questions of law" applies. While there may be some tension in the circuits, no square conflict warranting review is presented.

As an initial matter, whether the BIA's determination in a particular case is considered discretionary un-

der Section 1252(a)(2)(B) and whether the exception in Section 1252(a)(2)(D) applies varies considerably based on the nature of the alien's particular claim in each case. Petitioner cites cases in which aliens raised many different types of challenges to the BIA's determinations that their crimes were particularly serious and the courts' *outcomes* differed. As discussed below, however, all of the courts petitioner cites agree that Section 1252 permits review of whether the BIA applied the correct legal standard to evaluate an alien's claim. To the extent that the Third Circuit has suggested a different analytical path than the Seventh, Ninth, and Tenth Circuits, a square conflict has not developed, and this Court's review would be premature.

i. The Seventh Circuit's holding that it lacked jurisdiction over petitioner's fact-bound claim does not conflict with any decision of the Ninth Circuit. Like the Seventh Circuit, the Ninth Circuit has stated that certain "particularly serious crime" determinations under Section 1231(b)(3)(B) are discretionary matters entrusted to the Attorney General, which it lacks jurisdiction to review. See *Afridi* v. *Gonzales*, 442 F.3d 1212, 1218-1220 (9th Cir. 2006).[7] But it has not yet addressed

[7] Petitioner cites *Matsuk* v. *INS*, 247 F.3d 999 (9th Cir. 2001), for the proposition that the Ninth Circuit has adopted a hard-and-fast rule "that [particularly serious crime] determinations fall within Section 1252(a)(2)(B)(ii)." Pet. 18. *Matsuk* should be read in light of the Ninth Circuit's acknowledgment that its recent cases have "minimized the effect of the jurisdictional bar established in *Matsuk*." *Alaka*, 456 F.3d at 101. Moreover, *Matsuk* was decided before the REAL ID Act added Section 1252(a)(2)(D) to the INA, and it thus does not provide much insight into the Ninth Circuit's current approach to determining when

whether the Attorney General's determination that a non-aggravated felony is a particularly serious crime is a discretionary decision made unreviewable by Section 1252(a)(2)(B). See *Morales* v. *Gonzales*, 478 F.3d 972, 979-980 (9th Cir. 2007). Further, like the court below, the Ninth Circuit has permitted review under Section 1252(a)(2)(D) of certain questions of law, such as "whether the BIA applied the correct legal standard in making its determination" that a crime was particularly serious. *Afridi*, 442 F.3d at 1218; see *Tunis* v. *Gonzales*, 447 F.3d 547, 549-550 (7th Cir. 2006) (also permitting review of question of law).

Petitioner claims a conflict with the Ninth Circuit's decision in *Afridi* v. *Gonzales*, where the court asserted jurisdiction over an alien's claim that the BIA did not fully engage the *In re Frentescu* factors when deciding that the alien's crime was "particularly serious." 442 F.3d at 1218-1220. However, the court's decision in *Afridi* is not inconsistent with the decision of the court of appeals here. First, the Ninth Circuit announced an approach virtually identical to the one employed by the court below: "While we cannot reweigh evidence to determine if the crime was indeed particularly serious, we can determine whether the BIA applied the correct legal standard in making its determination." *Id.* at 1218. Cf. Pet. App. 6a ("[W]e retain jurisdiction to examine whether the correct legal standard was applied to the

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"particularly serious crime" determinations are reviewable under Section 1252(a)(2).

Petitioner also suggests (Pet. 18) that *Unuakhaulu* v. *Gonzales*, 416 F.3d 931 (9th Cir. 2005), establishes a general rule for the Ninth Circuit. But the court's statements regarding the application of the Section 1252 bar to particularly serious crime determinations are dicta, and that case did not address the REAL ID Act.

alien's claim for relief."). Although the Ninth Circuit agreed to review the alien's claim in *Afridi*, while the Seventh Circuit declined to review petitioner's claim, the claims in the two cases are quite different. In *Afridi*, the alien claimed that the BIA evaluated "one fact and one fact only: the length of time he was to be on probation," and that "the BIA * * * failed to engage in a case-specific analysis." 442 F.3d at 1219-1220 (internal quotation marks omitted). In contrast, here petitioner's primary objection was that the BIA failed to give "adequate weight" to certain facts (such as mitigating circumstances) in its case-specific determination that his crime was particularly serious, Pet. C.A. Br. 19, and it cannot reasonably be disputed that the BIA did in fact consider several relevant factors set forth in *In re Frentescu*, Pet. App. 38a-39a, 56a-58a. Because the alien's claim in *Afridi* was different in kind from the claim petitioner advanced here, the difference in the courts' outcomes does not illustrate a difference in approach.

Petitioner also suggests that the decision below conflicts with the "approach taken" in *Morales* v. *Gonzales*, 478 F.3d 972 (9th Cir. 2007). Pet. 15-16. Again, there is no conflict in approach: like the Seventh Circuit, and consistent with *Afridi*, the Ninth Circuit exercised jurisdiction "to review the IJ's denial of [the alien's] application for withholding of removal to the extent that [he] raises questions of law." *Morales*, 478 F.3d at 978. It then reviewed an issue of law, namely, whether the IJ failed to apply the BIA's rule "that only the record of conviction and sentencing information may be considered in determining whether [the alien's] conviction was for a particularly serious crime." *Id.* at 981-983. *Morales* therefore does not conflict with the Seventh Cir-

cuit's decision in this case concerning the bar to withholding of removal.

ii. Similarly, the court of appeals' decision here creates no conflict with the Tenth Circuit. In *Brue* v. *Gonzales*, 464 F.3d 1227 (2006), cited by petitioner (Pet. 15, 16), the Tenth Circuit agreed that Section 1252 permits it to review some challenges to particularly serious crime determinations under Section 1231, and it adopted an approach that is consistent with that of the Ninth Circuit and the court below: "While we cannot reweigh evidence to determine if the crime was indeed particularly serious, we can determine [under the REAL ID Act] whether the BIA applied the correct legal standard in making its determination." *Id.* at 1232 (quoting *Afridi*, 442 F.3d at 1218).[8] The court then considered the alien's challenge to the BIA's determination that his sexual assault offense was a "particularly serious crime" because that challenge raised a legal issue within the exception in 8 U.S.C. 1252(a)(2)(D). *Id.* at 1231. The court noted that the BIA was "aware of the full factual background of the offense" and had "recited two of the *In re Frentescu* factors, including the most important one, danger to the community," demonstrating that it had "considered the appropriate factors in reaching [its] conclusions." *Id.* at 1234-1235. The *Brue* Court thus allowed review of the same general type of claim considered by the Seventh Circuit here, *i.e.*, whether the BIA applied the correct legal standard in determining that

[8] The *Brue* court did not consider whether review of a "particularly serious crime" determination was a discretionary determination under 8 U.S.C. 1252(a)(2)(B)(ii), because the alien in that case had committed crimes that subjected him to the distinct jurisdictional bar in 8 U.S.C. 1252(a)(2)(C). 464 F.3d at 1231.

the particular factual circumstances of the alien's claim made it a "particularly serious crime."

iii. The decision below is in tension with the Third Circuit's decision in *Alaka*, but it does not create a square conflict. In *Alaka*, the Third Circuit held that the "particularly serious crime" "exception to eligibility for withholding at 8 U.S.C. § 1231(b)(3)(B)(ii) is not a decision 'the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security.' 8 U.S.C. § 1252(a)(2)(B)(ii)." 456 F.3d at 95.

Although the Third Circuit stated broadly that Section 1252(a)(2)(B)(ii) does not apply to a "particularly serious crime" determination, the only question it actually proceeded to review in *Alaka* was a question of law—whether a crime must be an aggravated felony to be considered "particularly serious"—which is the type of claim that all of the cited circuits have agreed would be reviewable under Section 1252(a)(2)(D). Indeed, the Third and Seventh Circuits arrived at precisely the same conclusion, which is that they had jurisdiction to consider whether a crime must be an aggravated felony to be "particularly serious" because that claim was exempted under Section 1252(a)(2)(D). And although the Third Circuit noted in *Alaka* that its statement that "particularly serious crime" determinations under Section 1231 generally are not discretionary decisions exempted from judicial review "threaten[ed] to bring [it] into conflict with the Ninth Circuit Court of Appeals," it then explained how both its approach and the approach of the Ninth Circuit would allow review of legal claims like the one the alien raised in *Alaka*. 456 F.3d at 100-101 (citing *Afridi*'s rule that the court could "determine whether the BIA applied the correct legal standard in

making its determination," 442 F.3d at 1218). There accordingly is no conflict with the result reached by the Ninth Circuit in *Afridi* or the Seventh Circuit in this case.[9]

c. Review is also unwarranted because resolution of the second question presented likely would have no impact on the outcome of petitioner's case. Had the Seventh Circuit decided to review the BIA's application of its legal standard to petitioner's facts, it very likely would have affirmed the BIA's conclusion. Whether a crime is "particularly serious" depends upon "factors [such] as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community." *In re Frentescu*, 18 I. & N. Dec. at 247.

Here, as the court of appeals explained, "the very definition of [petitioner's] conviction involves the intentional infliction of bodily harm * * * with a dangerous weapon," and petitioner committed the crime by "us[ing] a carpenter's knife * * * to inflict multiple wounds on his victim," while yelling "I'm gonna kill you all." Pet. App. 4a, 58a; see *In re Frentescu*, 18 I. & N. Dec. at 247 ("Crimes against persons are more likely to be categorized as 'particularly serious crimes.'"). Although petitioner received a sentence of only eleven months of imprisonment, that term was followed by seven years' probation, and the crime "carrie[s] a potential sentence of 9 years' incarceration and a $10,000 fine, indicating the

[9] The Third Circuit's more recent decision in *Lavira* v. *Attorney General*, 478 F.3d 158 (3d Cir. 2007), likewise appears to have presented a legal issue—whether the IJ applied the correct legal standard, which required the IJ to consider the particular facts of the alien's case.

seriousness by which the community regards such offenses." Pet. App. 58a. Conversely, the mitigating factors petitioner cited "do[] not alter the fact that [petitioner] has shown a propensity for violent behavior and a disregard for the risk of physical harm to others." *Id.* at 39a. Indeed, every decisionmaker in this case remarked on the seriousness and dangerousness of petitioner's crime. *Id.* at 66a-67a (IJ); *id.* at 38a-39a, 56a-58a (BIA); *id.* at 4a-5a (court of appeals).

Because petitioner's crime clearly was "particularly serious," resolution of the second question presented would have no effect on the ultimate disposition of this case. Accordingly, even if there were a circuit conflict that might warrant this Court's review at some point, this case would not provide an appropriate vehicle for addressing the scope of review under Section 1252(a)(2). See Robert L. Stern et al., *Supreme Court Practice* 457 (8th ed. 2002) (case is "a poor vehicle for resolving a conflict" when the outcome would be the same "regardless of how the Court resolves the question presented").[10]

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[10] Petitioner also claims (Pet. 13-14) that the Seventh Circuit created a circuit conflict in holding that "Section 1252(a)(2)(B)(ii) bars review over a [particularly serious crime] determination in the asylum context." See Pet. App. 14a. The Third Circuit held in *Morales* that Section 1252(a)(2)(B)(ii) does not apply to "particularly serious crime" determinations in the asylum context because that section expressly excludes from the bar to judicial review "the granting of relief under section 1158(a) of this title." See 478 F.3d at 978-979. The Seventh Circuit in this case did not address that contention, however, and its decision therefore does not present a circuit conflict with respect to it. Furthermore, the Seventh Circuit *did* review petitioner's legal argument concerning his asylum claim—that his conviction was not for a "particularly serious crime," Pet. App. 11a-13a—and petitioner does not seek review of that holding as he does in Question 1 of the petition with respect to withholding of removal.

3. Finally, we note that the court of appeals remanded petitioner's CAT claim to the BIA for further proceedings, Pet. App. 18a-19a, and the BIA remanded the claim to the IJ, see *In re Ali*, No. A77 607 113 (BIA June 5, 2007), slip op. 2. If petitioner obtains relief under the CAT, then he will be entitled to deferral of removal—much the same relief he would obtain through withholding of removal to Somalia under 8 U.S.C. 1231(b)(3). The court of appeals' remand of petitioner's CAT claim thus also weighs against review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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